VIRGINIA LAW REGISTER

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Mr. Justice Hughes' Address before the New York State Bar Association.

As might be expected, Mr. Justice Hughes' address on the evening of Friday, January 14th, 1916, before the Bar Association of New York State was an able and interesting one.

Needless and numberless legislative enactments, the judicial function, and legislation affecting the courts were the principal subjects touched upon. In dwelling upon the first subject the learned Justice gave a little dissertation on the importance of local self-government which we wish he and the great tribunal over which he presides would always bear in mind when deciding cases involving the rights of the states. He said:

> "An overcentralized Government would break down of its own weight. It is almost impossible even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. If there were centred in Washington a single source of authority from which proceeded all the governmental forces of the country—created and subject to change at its will—upon whose permission all legislative and administrative action depended throughout the length and breadth of the land, I think we should swiftly demand and set up a different system. If we did not have States we should speedily have to create them. We now have them, with the advantages of historic background, and in meeting the serious questions of local administration we at least have the advantage of ineradicable sentiment and cherished traditions. And we may well congratulate ourselves that the circumstances of a more perfect Union has given us neither a confederation of States, nor a single centralized Government, but a nation—and yet a Union of States each autonomous in its local concerns. To preserve the essential elements of this system—without permitting necessary local

autonomy to be destroyed by the unwarranted assertion of Federal power, and without allowing State action to throw out of gear the requisite machinery for unity of control in national concerns, demands the most intelligent appreciation of all the facts of our interrelated affairs and far more careful efforts in co-operation than we have hitherto put forth."

Upon the question of legislation affecting the courts the Justice said that the tendency to thrust administrative duties upon them "undoubtedly arises from distrust of powerful administrative agencies; it shows a desire to escape their authority, and to have the judgment of judicial tribunals, with whose standards the public is familiar, in the final decision of difficult administrative problems. It seems to me to be the wrong way to reach the right result. To put upon the courts the burden of considering the details of administrative problems would be to overwhelm them. It cannot be too strongly insisted that, if we are to have these important administrative instrumentalities properly perform their duty, they should stand on their own footing, and that the public should realize that their safeguard is not in injecting the courts into the work of administration, to the confusion of both, but in maintaining an enlightened policy and in insisting upon proper standards of official conduct. The courts cannot be substituted for administrative agencies."

Justice Hughes said that the tendency in legislation to deny Judges authority, such as restricting the freedom of a Judge in instructing a jury, "betrays a regrettable distrust."

The Justice next said that he was glad that at last the time had arrived when we may reasonably expect radical changes in our procedure laws. The essentials of procedure are simple, he said, and they should conform to one simple type, with only such modifications as are necessary to adapt it to differences in jurisdiction. He made these suggestions:

"We have become accustomed to a network of legislative rules of practice which in their complexity are a reproach to the State. The remedy, I believe, is to replace these rules with a few statutory provisions forming the basis of procedure, leaving all the details to be supplied by rules of court. The important equity practice of the Federal courts of the country is governed without difficulty by a few rules promulgated by the Supreme Court. There is no other way, it seems to me, to give the requisite simplicity and elasticity to procedure. There may be a prejudice among lawyers to committing this power to the bench because of the fear that rules of practice will be removed from the range of the just influence of the bar. This, I think, is a misapprehen-

sion. It would be far easier to convince a court of the necessity of a change in its rules than to convince the Legislature, while on the other hand unnecessary tinkering would be made more difficult."

To all of which we say "Amen," most sincerely, although it is now almost treason in Virginia to even hint at the wisdom of allowing a judge to direct a verdict. We have even made it against the law. One judge we wot of used to say very mildly to a jury in certain criminal cases, "Gentlemen, I can not direct you what verdict to find in this case, but I sincerely hope it will not be one I shall feel constrained to set aside." We do not believe he was ever required to do this in any instance in which he used this formula.

Administrative Power in the Courts.

We Virginians, and especially we Virginia lawyers, are a queer lot, anyway. From time immemorial we have magnified the trial by jury and minimized the beneficient power of the judge. We have muzzled him as to instructions; we have forbidden him to direct a verdict in even the plainest case. We have made his power to punish for contempt almost contemptible and yet we have put in his hands two administrative functions which give him in one case all the power of the Legislative body and in the other the absolute control of the choice of county officers. We refer first to the act in regard to extending or contracting the limits of cities, and second to his powers in deciding contested elections for city or county officers.

Under the first he exercises purely administrative functions—a mingling of legislative and judicial duties—which seem almost radical in their extent and which to some of us—despite Judge Harrison's opinion in Henrico Co. *v.* City of Richmond, 106 Va. 282—seem yet to be far beyond anything dreamed of by the Constitution makers of days prior to "Legislative Constitutions." It may be—doubtless is—a far better and more equitable way of extending or contracting corporate limits than by Legislative enactment; but there are very many things we think the courts could

do better than any legislative assembly and yet which no one could ever dream of imposing upon them.

And the danger is, as Justice Hughes points out, that by and by the legislative bodies in their attempt to shift responsibility, will burden the courts with duties which will so mingle legislative and judicial functions that the wise barrier erected between them will be broken down and a danger hard to be over-estimated brought to threaten our mode of government.

The second power to which we refer is as to the power of the judge in contested election cases, where city, county, or town officers are concerned, under Section 160 of the Code of 1904. This section provides that after the notice is given and the testimony taken, the court in judging such election or return shall proceed on the merits thereof and decide the same according to the Constitution and laws. When the contest is decided a certificate of election shall be granted to the successful party unless he shall have already received one. If, however, the court shall be of the opinion that there has been no valid election of any person, the proceedings shall be in conformity with Section 106.

This latter section allows the judge to fill a vacancy by appointment for the whole term of the office declared vacant. So in case of a contest for an office to be filled in the election held last November, say for County Clerk, in the event that the court held there had been no valid election, then the judge appoints a clerk for the full term.

The statute, therefore, puts in the power of a judge to overturn an election in which one candidate may have defeated another by a thousand majority, and *there is no appeal from his decision.* Whilst we have no fear, as long as our judiciary is as present constituted, there has been a time when we would not have felt as safe and that time may occur again, it is possible. Would it not be safer and more in a line with our institutions to direct the judge to order a new election to take the place of the one declared invalid?

In a very able and interesting address delivered by Mr. Elihu Root at the same Bar Association, he called attention to the fact that in most foreign countries the courts are part of the administrative system of the Government, not independent tribunals to do justice between individuals, and the Government, and

warned his hearers that the whole business of government in our country is becoming serious, grave and threatening, by imigrants from those countries gradually grafting their ideas on our own form. Would it not be well to limit instead of extending this mingling of judicial with administrative functions?

Interstate Commerce as a Police Measure.

Our fathers little imagined, when they drafted the Interstate Commerce Clause in the United States Constitution, that a time would ever come when laws enacted under it would become effective police measures. But such has become the case. The "White Slave Law"—so-called has under the construction put upon it by the highest tribunal in this Government, become a police measure of the strictest kind, punishing any act of immorality which occurs by transportation of one of the guilty parties from one state to another. The act, however, seems to us to have been stretched to the breaking point by the verdict of a jury and judgment of the Court in a case in one of the Districts of Virginia: A couple of young folks loved "not wisely, but too well." The "inevitable consequence" resulting, the young woman besought the man to remove her to some distant city, where the "inevitable" might "result" without too much publicity. He engaged quarters at a maternity hospital in a neighboring state and wrote to that effect to the young woman, telling her to meet him in Washington. She did so, paying her own expenses to that city. Whilst there and in the City in which the hospital was situated, the couple occupied the relation of man and wife. Later on the young man was arrested, tried, found guilty by a jury, and the judge, somewhat reluctantly, it appears, gave a sentence of slight imprisonment.

Now, leaving out the question of jurisdiction in Virginia, can it be supposed that the "White Slave Law" was intended to cover such a case as this? And yet under the construction put upon it by the Supreme Court, can it be said that the judgment is not right? The case has been appealed and we therefore will not discuss it further.

Another case—which, however, has resulted in an appeal being sustained, was this: A man, it seems, had been in illicit relations with a woman who left the state and temporarily moved into another. At the request of a sister of the female, the man went into the adjacent state and brought the woman back, so that she could look after the sister's family during the latter's sojourn at a hospital, undergoing an operation. He did so and the woman came back with him—he in no way contributing to her transportation, but merely acting as her escort. On her return to this state illicit relations were resumed, and being discovered, he was indicted under the "White Slave Act" and convicted, the conviction, as we have stated, being set aside and a new trial granted. Whilst this editorial was being written, the newspapers contained an account of a large and apparently lucrative system of black mail carried on in New York by a gang of smart men and pretty women, who watching wealthy men, succeeded in following or alluring them into adjacent states and fleecing them out of a large sum by claiming to be United States officers armed with warrants to arrest the unfortunate victims for violating this law. It seems to us that a law has something radically wrong in it which can be made responsible for such cases and yet the wrong is in the man rather than in the law, after all.

We cannot imagine, however, a more thorough check to "Interstate immorality," if it is enforced in its strictest sense. Gay Lotharios should be careful how they cross state lines with ladies of doubtful or "undoubted" reputation.

And now the Supreme Court of the United States has effectually "squelched" the interstate commerce in the "cure all" remedies which for many days have spoiled both the digestion and pocketbooks of many unfortunate "malades," both "imaginaries" and otherwise.

In the "Doctor Johnson Cancer Cure Case," the question of whether a label was false and fraudulent within the meaning of the Act of Congress known as the Food and Drug Law, arose. The Supreme Court decided that as the Act then stood such a label was only false and fraudulent when it misstated the ingredients of the compound. The Sherley Amendment to the Act was passed in 1912 and the law so extended as to cover any case

where the package or label bore any statement, design or device regarding the curative or the effect of such article or substances contained therein which was false or fraudulent. The Erkman Manufacturing Company sold in the various states of the Union a package containing a so-called "Alterative" which set out in a pamphlet enclosed in each wrapper around the package, that the alterative was "effective as a preventative of pneumonia" and that the proprietors "know it has cured and will cure tuberculosis."

The Erkmans were indicted, found guilty, appealed and the Supreme Court of the United States, in an opinion handed down by Hughes, J., sustained the conviction. The Justice said in part as follows:

"Congress is not to be denied the exercise of its constitutional authority over interstate commerce and its power to adopt not only means necessary but convenient to its exercise because these means may have been the quality of police regulation.

"Referring to the nature of the statement, which are within the purview of the amendment, it is said that a distinction should be taken between articles which are illicit, immoral, or harmful, and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as 'illicit,' and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce as well as, for example, lottery tickets. The fact that the amendment is not limited, as was the original statute, to statements regarding identity or composition (as in United States against Johnson, referred to above) does not mark a constitutional distinction. The false and fraudulent statement which the amendment describes, accompanies the article in the package, and this gives to the article the character in interstate commerce.

"Finally, the statute is attacked upon the ground that it enters the domain of speculation and by virtue of consequent uncertainty operates as a deprivation of liberty and property without due process of law and in violation of the Fifth Amendment to the Constitution and does not permit of the laying of a definite charge, as required by the Sixth Amendment. We think this objection proceeds upon a misconstruction of the provision. Congress deliberately excluded the

field where there are honest differencies of opinion between schools and practitioners. It was plainly to leave no doubt upon this point that the words 'false and fraudulent' were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive an intent which may be derived from the facts and circumstances, but which must be established.

"That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But a state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge and may be held to good faith in their statements. It can not be said, for example, that one who should put inert or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the lawmaking powers.

"Congress recognized that there must be a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods and in the nature of the case can be deemed to have been made with fraudulent purpose. The amendment of 1912 applies to this field, and we have no doubt of its validity."

We are inclined to think that Mr. Justice Hughes' statement that "a state of mind is itself a fact and may be a material fact" will be approved by psychologists, but is somewhat too metaphysical for the ordinary mind. But anyway the decision in this particular case is an admirable one and its result almost reconciles us to the "police power" it carries with it.

Substituted Service on a Married Woman.

It is a very curious thing that Section 3207 of the Virginia Code providing for service of process has not been amended in regard to service upon a married woman. The act is to be found as far back as the Code of 1849, page 639, and while amended and reenacted in 1902-3-4, page 632, no provision seems to have been made for con-

structive service upon a married woman, although the Married Woman's Act, allowing suits against a married woman, had been passed many years previously. The act provides that if the person to be served with process "be not found at his usual place of abode, service may be made by delivering such copy and giving information of its purport to his wife or any person found there who is a member of his family and above the age of sixteen years; or if neither he nor his wife, nor any such person be found there, by leaving such copy posted at the front door of said place of abode." Most lawyers have supposed that the word "wife," under clause 13 of Sec. 5, Code of 1904 might be construed as "husband," and the word "his" be construed "her," and certainly there is strong ground for the argument when clause 13 says, "a word importing the masculine gender, only, may extend and apply to females, as well as males," but Professor Burks, in his admirable work on Pleading, page 301, takes the opposite ground: "Process against a married woman must be served personally. The provisions of the statute for the service of process must be substantially complied with, and the method of service cannot be otherwise than is there prescribed.

The Virginia statute allowing the substituted service was enacted at a time when a married woman could not be sued alone at law and has not been altered since her disabilities have been removed, and while it is true that this would make no difference if the language of the statute were broad enough to cover the case, and that Sec. 5, Clause 13 of the Code provides that the word importing the masculine gender, only, may extend and be applied to females as well as males, still there is no authority for substituting *'husband'* for *'wife,'* nor for making the family *her* family when the husband is still living and the head of the family. The substituted service is not only allowed under the statute if *he* be not found at *his* usual place of abode, and the copy is to be delivered to *his wife,* or to a member of his family. Such language seems to be a little inept to describe substituted service on the wife and to hold it applicable to her would not be a substantial compliance with the statute. Furthermore, there may be good reasons for not allowing such service."

The objection that the original act was passed at a time when a married woman could not be sued alone at law, would seem not

to be tenable in view of the re-enactment of the act December 10th, 1903; but the other objection advanced by Mr. Burks that there is no authority for substituting "husband" for "wife," nor for making "his family" "her family," when the husband is still living and the head of the family, seems to be well taken. At any rate the act should certainly be amended so as to provide for substituted service on a married woman; for we cannot see any good reason, and Mr. Burks certainly gives none, for not allowing such service. On the contrary there is every reason for it. A married woman now stands in the eye of the law, as far as suits by and against her are concerned, exactly as if she were a feme sole, and there is no reason why process should not be served upon her in the same manner in which it would be served upon a feme sole. It might be said that the same objection applies to service upon an unmarried woman, and probably a strict construction might defeat such service, for the language of the act is "his wife, or any person found there who is a member of his family," and even if the word "wife" were to be changed to "husband," or the words "member of *his* family" be changed to "member of *her* family," how can a feme sole have a family? For instance, Alice, the daughter of John Smith, a feme sole of lawful age, is sued; she is not found at her usual place of abode; she has no husband, service is made upon her brother, residing at her usual place of abode. Can he be construed to be a member of her family? For she is certainly not the head of the family, and would not Mr. Burks' argument apply as well to a feme sole as to a married woman? The act should certainly be amended by the present Legislature and provide, to cure any question, that service upon a married woman not found at her usual place of abode, "may be made by delivering a true copy of the process and giving information of its purport to her husband or to any person found there who is a member of her husband's family and above the age of sixteen years; or if neither she nor her husband, nor any such person be found there, by leaving such copy posted at the front door of said place of abode; and service upon an unmarried woman may be made in the same manner as upon a married woman."

We respectfully call the attention of the Legislature to the necessity of such an act, to be passed as soon as possible, as we

happen to know of two cases which were lost by the sheriff serving the process against a married woman as if she had been a male, and the decision of the judge in one of these cases seemed to take the entire bar by surprise, although it ought not to have done so if they had examined Professor Burks' work.

What is a Treat?

In view of the fact that the present Legislature of Virginia will be called upon to legislate upon the somewhat vast subject of controlling a traffic which will be supposed not to exist after November 1916—that is to say, the liquor traffic—it is not an unwise thing to consider some of the laws which have been passed and the constructions put upon them.

In England, in several portions of the Kingdom the civic authorities had issued what are called "orders," making it an offense for any person to "treat" a soldier. The city of Southhampton, acting under authority given by the law, formulated an order making it an offense for any person to treat a soldier at a public house within a radius of six miles from Bargate. Two soldiers soon thereafter went into a public house together and drank; one paid for his own drink, got change and handed it to his companion, who thereupon ordered a drink for himself and paid for it with the money so given him. The judge considered this was a treat, and while refusing to convict under the case at bar because it was the first which had come up under the new order, intimated that he would convict in any other case brought before him in which the order was violated. We suppose that in this case the bench was right, because the drink was really bought while the two men were together, and it would be a mere evasion to say that this was not actually standing treat. The *London Law Journal,* however, takes the contrary view and contends that the order was aimed at the mischievous practice in accordance with which A stands B, C, and D, drinks, with the intention that B will presently follow suit, then C and D. But we do not agree with our contemporary. The law was aimed—and wisely, we think—at preventing one man from furnishing another with a social glass, a practice which too often leads to two

drinks, where one only would have been taken but for the treating habit, and the statute being criminal in its nature should be strictly construed. But the Journal raises several questions as to whether, if A goes into the public house when B is drinking and asks B to lend him a sixpence to get a drink, this would be treating. We think clearly not. It is the social feature of the drinking together and paying for other men's drinks, at which the act is aimed.

One question not raised by our contemporary is this: Suppose two soldiers go into a public—as our English brethren call the bars—and the landlord gives them two drinks on the house—would this be treating? We think it would.

Then the question comes up—If Col. Jones and Captain Smith go to the house of Squire Thompson and the Squire sets up his bottle on them, would not this be treating, or would the court take into consideration that to "stand treat" refers almost exclusively to paying for another man's drink at a public bar?

Of course when all of the barrooms and hotels in Virginia cease to sell liquor, treating will be impossible and therefore no such law would probably be passed, but the question is one of some interest, if only from the amusing standpoint.